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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| CENTER ASSOCIATES, et al.,<br><br>Plaintiffs, Cross-Defendants and Appellants,<br><br>v.<br><br>WILLIAM ALTMAN, et al.,<br><br>Defendants, Cross-Complainants and Respondents. | D053266<br><br>(Super. Ct. No. 37-2007-00069346-CU-MC-CTL) |

APPEAL from an order of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed; motion to strike is denied in part and granted in part; motion for sanctions denied.

Plaintiffs, cross-defendants and appellants Center Associates, L.P., et al. (Center) and their individual principals and an affiliated business (together Appellants or Center),[1]

[1] Cross-defendants and Appellants are, in addition to the limited partnership Center, its equity owners and key personnel Mark I. Finfer and Jonathan M. Finfer, and its general partner, Renaissance Properties, Inc. (RPI). According to the Appellants' reply brief, RPI's official, cross-defendant Kenneth C. Krause, passed away in January 2009.

appeal the trial court's denial of their special motion to strike the second amended cross-complaint (SACC), an anti-SLAPP motion. (Code Civ. Proc.,[2] § 425.16.) The SACC was filed by defendants, cross-complainants and respondents, William Altman, et al. (referred to as Respondents, the homeowners or the residents), who are homeowners of 33 of the 48 units in a Clairemont condominium project (the condos). The homeowners were sued by Center for declaratory relief (interpretation of the governing documents affecting their property), and responded with the SACC's claims for breach of contract, invasion of privacy, abuse of process, and other theories.

Since around 2002, Center has been planning to redevelop improved commercial property that it owns, adjacent to the lots upon which the condos were built, including its Lot 4, over which the homeowners have various access and easement rights for parking and utilities. Various disputes led to the filing of Center's underlying declaratory relief complaint against Respondents in 2006. Upon being sued as cross-defendants, Appellants brought demurrers and this special motion to strike, attacking the SACC as based solely or principally on protected free speech or petitioning conduct, i.e., preparation for litigation of the declaratory relief actions, and/or development-related communications with public officials in the building department of the City of San Diego (the City).

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We consider the issues as they existed only at the time of the subject ruling and only as to the appearing parties.

[2] All statutory references are to the Code of Civil Procedure unless otherwise specified. "SLAPP" refers to "strategic lawsuits against public participation." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*).)

The trial court denied Appellants' special motion to strike the SACC, ruling that the challenged conduct was not on its face entitled to the benefits of section 425.16, because it did not fall within the statutory language that defines protected communications in litigation and official petitioning activity. (§ 425.16, subds. (e)(1) & (2).) In addition to those conclusions, the court reached the second portion of the statutory test under the anti-SLAPP statute, i.e., it ruled that even if the burden had been shifted to Respondents to establish the probability that they will prevail on their claims, they carried that weight, so the motion to strike was denied. (§ 425.16, subd. (b)(1).)

Appellants argue the trial court erred as a matter of law in finding the anti-SLAPP statute was inapplicable by its terms. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*) [establishing a two-pronged test for application of the statute].) Appellants claim all the subject causes of action clearly arose out of protected petitioning activity, and that the "crux" of the SACC "seeks to hold Center Associates liable for requesting a judicial determination of, and city approval regarding, its development rights."

Appellants have also brought a motion to strike in this court, deferred to this merits panel, requesting that portions of the Respondents' brief and Respondents' appendix be stricken, either as unsupported by the record or because certain materials provided from the trial court record postdate the order on appeal. Appellants seek an

award of attorney fees, and Respondents request sanctions for a frivolous appeal. (§§ 425.16, subd. (c); 907.)[3]

Where a plaintiff or cross-complainant is pleading causes of action that are related to or associated with earlier litigation-related activities, the courts must closely examine which acts in that process "gave rise to the asserted claims," for purposes of applying the anti-SLAPP statute. (*Navellier, supra,* 29 Cal.4th at pp. 88-95.) On de novo review, we agree with Respondents on the first prong of the applicable test that the face of the SACC alleges additional and materially different acts that "gave rise to the asserted claims," distinct from protected petitioning conduct. The SACC principally alleges conduct between private parties, in the nature of claimed breaches of contract and tortious conduct, that is independent from protected litigation or development communications. The anti-SLAPP statutory protections do not clearly apply as a matter of law. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 105-106 (*Mann*).)

The only clear exception to those conclusions about the first prong of the analysis concerns the abuse of process cause of action. There, the alleged tortious conduct substantially arose from and is related to ordinarily protected conduct. Nevertheless, with respect to the second prong of the test, the trial court correctly concluded that Respondents had made an adequate showing that they would probably prevail in that

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3 Before the trial court heard this motion to strike and the related demurrers, it issued an order severing the complaint and cross-complaint proceedings. Only the cross-complaint issues are before us in this appeal regarding the special motion to strike, and Appellants have not directly challenged the rulings that overruled their demurrers (although they reiterate some of those arguments, as they did in the trial court when the motions were heard together).

respect, so avoiding the granting of the motion to strike. The court's ruling was also free of error, that the remaining causes of action against Appellants had been demonstrated to pass the "probability of prevailing" statutory test. (§ 425.16, subd. (b)(1).)

Finally, there is no basis for any award of attorney fees nor sanctions in this record. (§§ 425.16, subd. (c); 907.) We affirm the order and strike those portions of the Respondent's appendix that postdate the issuance of that order.

## FACTUAL AND PROCEDURAL BACKGROUND

We will outline the background facts in a somewhat abbreviated manner, since the purpose of this opinion is not to resolve the merits of the overall dispute, but rather to determine whether the anti-SLAPP statutory scheme properly applies to this set of allegations concerning the parties' interactions. In outlining this portion of the dispute in context, particularly the SACC, we adapt factual and procedural summaries set forth in other cases we have previously resolved regarding these parties.[4]

### *A. Nature of Dispute; Pleadings*

The underlying litigation involves a dispute between adjacent owners of real property in the area of the Sea Canyon condominium project in Clairemont (the "condo

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4 In *Center Associates v. Altman* (Feb. 25, 2009, D051583 [nonpub. opn.]), this court affirmed an order denying contractual attorney fees to Respondent as of that time. In *Center Associates v. Superior Court* (Nov. 4, 2008, D053469 [nonpub. opn.]), we granted a petition by Center for a writ of mandate, ordering the superior court to vacate its order granting the motion to disqualify Center's counsel and to enter a new order denying the motion. Although we denied a request to order the matter heard before a different trial judge, Judge Hayes nevertheless recused himself after these rulings were made. Apparently, the severed complaint only went to trial before Judge Taylor after this motion was heard (although we decline to approve the inclusion of his statement of decision in the current record).

project," comprised of six lots). Both commercial (Lots 1-3) and residential condominium units had been built there by the early 1980's. All the residential condo units are located on Lots 5 and 6, and access to their property, parking, and utilities are provided by easements over Lot 4. The residential units have no public street frontage.

Originally, Lot 4 was owned by the homeowners, through their master association. That master association was created by, and the condo project governed by, a 1981 set of CC&R's, filed when the homeowners' association was incorporated (1981 CC&R's). The master association originally held title to Lot 4, the parking area over which the homeowners retained easement and access rights.

When Center's commercial complex was originally constructed, its permits included a City Planned Commercial Development Permit No. 72 (Permit 72), approved September 27, 1979. Permit 72 requires that at least 215 offstreet parking spaces shall be provided and maintained on the property, referring to a map, and they "shall be permanently maintained and not converted for any other use."

Permit 72 provides as part of its standard general conditions, in pertinent part, "This planned commercial development permit shall inure to the benefit of and shall constitute a covenant running with the lands, and their terms, conditions and provisions hereof shall be binding upon Permittee, and any successor or successors thereto, and the interests of any successor shal1 be subject to each and every condition herein set out."

As alleged by the SACC, the governing document for the homeowners' property is the 1992 CC&R's, called the First Amended and Restated Master Declaration of Restrictions (here, 1992 CC&R's or the RMD). It revised and restated the CC&R's, by

dissolving the master association and selling Lot 4 to Center's predecessor, Fontenoy Tower Apartments, which agreed to maintain the parking area. This transfer was made subject to restrictions in the RMD, which incorporated Permit 72 provisions regarding parking and easements in the nature of equitable servitudes. The RMD requires that the respective owners allow each other reasonable access for utility maintenance.

The SACC alleges that when the homeowners agreed to the creation of the RMD in 1992, they were relying on false representations by Appellants about the purpose of it and about Appellants' agreement to continue to maintain Lot 4. For example, the RMD deals with parking issues at paragraphs 2.3 and 2.4, by allowing the parking and access easements to be "subject to reasonable regulation as hereinafter provided." Paragraph 3.3 of the 1992 CC&R's provides that the residential owners' consent must be obtained for any changes to the parking access and number of spaces, pursuant to Permit No. 72. In paragraph 4.2, the commercial owners agreed to undertake the sole responsibility for maintaining Lot 4, including cleaning, sweeping, striping, patching, resurfacing, and maintaining building lights on the commercial lots.

The RMD also provided: "Any Owner may delegate his or her right of enjoyment to the Parking Area and facilities thereon to the members of his or her family, tenants, guests, invitees and/or contract purchasers, subject to . . . Permit No. 72 . . . ." Center has unsuccessfully sought such a private agreement from the homeowners as part of its redevelopment plans.

After 1992, Lot 4 has continued to be used as a parking and access area for the condo project, as well as the business owners and their customers, and extensive disputes

over its use have developed. Beginning in 2002, Center made public its plans to redevelop its property, adding an underground parking garage on Lot 4. The homeowners have opposed these plans at town hall meetings and other ways, including the signing of a petition in 2003 against it.

While the parking disputes were going on, Center's former attorney (James Fitzsimmons) conducted investigations and recorded license plates of vehicles that visited the parking area. His office manager submitted a request for and obtained confidential Department of Motor Vehicle (DMV) address information about those vehicle users. In the normal course of business, the DMV notified vehicle owners, including homeowners, that these requests had been made. (Veh. Code, §§ 1808.21, 1808.22.)[5] Consternation ensued.

Meanwhile, particularly from August 2005 through February 2006, Center officials sent letters and notices to homeowners urging them to comply with its newly imposed parking restrictions and regulations, including obtaining insurance, relocating their utilities, paying parking fees, and restricting the use of spaces and permissible hours for parking, with threats to tow cars if necessary. The homeowners objected that Center was not complying with its duties under the RMD to allow parking pursuant to Permit 72 and to maintain the parking areas properly.

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5 According to the reply brief, cross-defendant James Fitzsimmons, formerly the attorney for Center, is in bankruptcy and subject to stay. He has made no appearance in this appeal. As explained, we grant Center's motion to strike materials provided in Respondents' appendix about Fitzsimmons's status in the matter, as they do not affect the issues presented on appeal.

In February 2006, Center brought the first of its two actions to obtain a judicial determination of rights and duties under the RMD, with respect to the disputes about the extent of the homeowners' easement and parking rights on Lot 4. In March 2007, the trial court determined at a continued status conference that not all of the indispensable parties had been served. Some parties had been served in error while being represented by counsel, some defaults were erroneously entered, and some proofs of service regarding Doe amendments were erroneously filed. The court dismissed the entire first complaint without prejudice, for lack of joinder of all essential parties, effective March 27, 2007.

On June 29, 2007, Center filed a second complaint under a new case number (this action), against homeowners. Center made the same and added more allegations about the proper interpretation of the RMD with respect to any regulation of easement rights. Center's action sought judicial interpretation of the governing documents, about the extent to which it must obtain approval from the homeowners for the proposed development, the extent of its allowable regulation of parking on Lot 4, including under Permit 72, and the applicability of zoning and its parking regulations to homeowners. The filings in this action included lis pendens.

The homeowners answered and filed their cross-complaint seeking damages for (first cause of action) breach of contract, (second cause of action) invasion of privacy, and (sixth cause of action) alleged RICO violations.[6] They contend their RMD

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6 18 United States Code section 1962 (RICO) provides in relevant part: "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate,

contractual rights were breached, such as where Permit 72 specified the parking spaces shall be "permanently" maintained and not converted for any other use. A previous demurrer was brought and the cross-complaint was amended to add more theories, including (third cause of action) abuse of process, (fourth cause of action) deceit, (fifth cause of action) waste,[7] and (seventh cause of action) unfair business practices within the meaning of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.).[8] We will set out a more detailed summary of those claims in part II, *post*.

The trial court severed the two pleadings for purposes of trial.

*B. Special Motion to Strike and Demurrer; Opposition*

In response to the SACC, Appellants filed their special motion to strike, arguing that all allegations of their activities in connection with the dispute arose from protected

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directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. [¶] (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section." Mail and wire fraud, such as the homeowners are alleging against Center, are defined in 18 United States Code sections 1341 and 1343.

[7] Section 732 provides: "If a guardian, conservator, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages."

[8] With respect to the unfair business practices cause of action (seventh cause of action), the trial court sustained Appellants' demurrer without leave to amend for lack of standing. Although Appellants now argue that those UCL issues somehow remain before this court, they did not appeal the demurrer ruling, nor was a cross-appeal taken by Respondents to challenge that ruling. We interpret the notice of appeal from the denial of the motion to strike to encompass only the remaining six causes of action in the SACC as to which demurrers were overruled, since the trial court evidently intended that those six causes of action constituted the operative pleading, and this was a correct analysis.

petitioning activity or conduct in preparation for litigation. Appellants also brought demurrers to all causes of action, alleging the applicability of litigation privilege and bar of the applicable limitations periods. (Civ. Code, § 47, subd. (b); Code Civ. Proc., § 338, subd. (d) [three-year limitations period for deceit].) Appellants relied on their demurrer papers in support of the motion to strike. These included lodged documents showing the dismissal without prejudice of Center's original complaint. Appellants did not file any of their own declarations, instead arguing issues of law and relying on the pleadings as constituting judicial admissions of the relevant facts.

In opposition, Respondents argued that the alleged conduct underlying their causes of action could not constitute protected petitioning or litigation activity within the meaning of the anti-SLAPP definitions. They provided declarations from a number of the residents about their negative experiences dealing with Center on parking issues, mainly the supposedly misleading preparation of the RMD and subsequent events. These included the residents' ongoing complaints to Center about the poor and messy condition of the parking area, an allegedly misleading and pretextual survey conducted in 2005 by Center's delegee about parking, and DMV notices to residents that their home addresses were released to an attorney who was representing a client in a civil or criminal action that directly involved the use of a motor vehicle. (Veh. Code, § 1808.22.)[9]

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9 During the events giving rise to this litigation, a previous version of Vehicle Code section 1808.22 was in effect. (Derivation: Former § 1808.22, added in 1989, and amended in 1990 and 1996. In 2003, the former section, relating to the same matter, was repealed by its own terms, operative Jan. 1, 2007, and replaced by current Vehicle Code

Lodged documents were submitted, including pleadings and maps from the previous case. Respondents also supplied copies of 2001-2002 memoranda between Center and City authorities about parking proposals for the proposed redevelopment. In 1979, a City planning department representative communicated with the City engineering department about the lack of adequate residential parking planned for this mixed use commercial residential development, stating that "it is felt that the availability of the commercial parking will adequately make up for this deficiency."

Also, Respondents requested judicial notice of erroneous proofs of service on some residents, and erroneous and rejected requests for entry of default, all filed by Center in the previous action.

In particular, the homeowners relied on lodged copies of correspondence they received from Center representatives from August 2005 through February 2006, asserting that Center was authorized to restrict parking, charge fees for use of the parking area, tow vehicles, enforce certain insurance requirements, and require the homeowners to move their utilities. These documents do not refer to the Permit 72 easements or to Center's own obligations for upkeep and maintenance of the parking area. Respondents assert these documents misrepresented the terms of the RMD and amounted to mail or wire fraud.

In reply, Appellants filed evidentiary objections, against portions of the residents' declarations, for lack of foundation, improper conclusions or argument, vagueness or

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section 1808.22.) There are, however, no issues presented here about the differences among the several versions.

ambiguity, improper speculation, and other defects. Appellants supplied an attorney declaration stating that this was treated as a complex action with many parties, and Appellants had corrected one erroneous naming of a deceased homeowner defendant. Appellants argued that the showing Respondents made in opposition actually supported Appellants' motion, by referring to filings in the prior litigation, including lis pendens, official investigations of parking issues, and statements made at town hall meetings about the development plans, which were of public interest.

*C. Trial Court's Ruling*

After oral argument, the trial court issued a ruling denying Appellants' motion to strike all causes of action, and overruling the demurrers (with the exception of the UCL claims; see fn. 8, *ante*). In its ruling, the court first took judicial notice as requested of the filings from the previous case (defaults and proofs of service and rulings) and Permit 72. The court issued a detailed ruling on the evidentiary objections to the residents' declarations, sustaining them in part and overruling in part.

The court's ruling applied the appropriate two-step analysis. Under the first portion of the test, the critical consideration was whether the causes of action arose from protected free speech or petitioning activity. The court reviewed the pleadings and the supporting and opposing affidavits outlining the facts upon which the liability or defenses were based. Then, the court specified numerous allegations in the SACC that fell outside of any protected petitioning conduct, as follows: Post-2003 conduct by Appellants was intended to coerce the residents to agree to the development plans, while Center had failed to propose any reasonable parking management plan, but instead was failing to

maintain the property adequately. Appellants were alleged to have made statements and written communications to the homeowners that misstated the provisions of the RMD, in connection with Center's threats to tow vehicles and charge for overnight parking. When Appellants obtained confidential DMV information about residents, guests and tenants, that was done without the statutorily required attorney affidavit. Further, Appellants misrepresented to the homeowners the insurance requirements and the obligations for upkeep and maintenance of the parking area.

The trial court concluded Appellants had not met their initial burden of establishing that a substantial part of the SACC arose out of protected activity. (*Mann, supra,* 120 Cal.App.4th 90.) Even assuming that Respondents were properly to be required to demonstrate a probability of prevailing on any part of their claims, the court found that adequate evidence had been presented to do so. This included copies in the record of Permit 72 and the RMD, as well as correspondence referring to new parking restrictions sought to be imposed by Center. The court ruled that an adequate showing had been made that Center's procurement of confidential DMV information was done by an office manager, without the necessary attorney affidavit, "under the guise that the motor vehicle's use gave rise to a civil or criminal action." The court found Respondents' probability of prevailing had been demonstrated and thus, this matter was entitled to proceed beyond the anti-SLAPP stage. No award of attorney fees or sanctions was made. (§ 425.16, subd. (c).)

*D. Appeal and Motion to Strike*

Appellants filed a notice of appeal challenging the trial court's ruling on the motion to strike, although not the demurrer rulings.

The Respondents' brief and appendix have made various representations that due to the existence of the order severing the SACC from the complaint, the merits of the declaratory relief request, that "parking may be 'reasonably' regulated" under the provisions of the RMD, have already been resolved for the most part, at trial before Judge Taylor (e.g., questions of law about the interaction of Permit 72, the original CC&R's, the 1990-1992 homeowner's transfer agreements, and the 1992 version of the CC&R's). Appellants then filed a motion in this court seeking to have this material and information about Attorney Fitzsimmons's bankruptcy and legal malpractice proceedings stricken.

In their opposition to the motion to strike, Respondents claim this extraneous material is appropriately included for "informational purposes." We disagree, and grant Appellants' motion to strike the portions of the Respondents' appendix that go beyond the record that was before the trial court when it made the order that has been appealed (pp. 49-127). (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [normally, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered].)

However, we will deny the motion to strike certain portions of the Respondents' brief that are arguably unsupported by the record, because, in the normal course of processing an appeal, our practice is to disregard improper argumentation and baseless

statements of fact. We defer discussion of the respective fees and sanctions requests. (Pt. IIIB, *post*.)

DISCUSSION

Appellants contend the trial court erred in denying their motion to strike the SACC, because in their view, the pleading was "triggered" solely by protected activity, i.e., conduct occurring in preparation for litigation and/or communications with public officials (building dept.), concerning their proposed redevelopment. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*); § 425.16, subd. (e)(1) or (2).) Appellants further claim the trial court erroneously ruled upon the second prong of the anti-SLAPP statute, because they believe Respondents failed to demonstrate any probability that they will prevail on the various claims in the SACC. (§ 425.16, subd. (b)(1).)

In reply, Respondents argue the trial court correctly determined that the principal thrust of the SACC addresses unprotected conduct, within the meaning of the initial prong of the anti-SLAPP analysis. Even if the burden were correctly shifted under the statute, they assert compliance with that requirement by showing a probability of prevailing as to each cause of action.

Our inquiry should be whether the protected petitioning conduct alleged in the SACC principally or substantially gave rise to the causes of action, within the meaning of the anti-SLAPP statutory scheme. (*Mann, supra*, 120 Cal.App.4th 90, 105-106.) To address these issues, we outline our rules of review and seek to clarify several preliminary procedural issues that have arisen.

I

*APPLICABLE STANDARDS*

A. Statutory Scheme; Effect of Demurrer Ruling

On appeal, we review de novo the trial court's ruling on the motion to strike. (*Martinez v. Metabolife International, Inc.* (2003) 113 Cal.App.4th 181, 186 (*Martinez*); *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727 (*Freeman*).) Whether section 425.16 applies to a particular complaint amounts to a legal question subject to de novo review. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.)

In an anti-SLAPP motion, the moving defendant is first required to make a prima facie showing the plaintiff's action is subject to section 425.16, by showing the defendant's challenged acts were taken in furtherance of constitutional rights of petition or free speech as defined by the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)[10] Normally, if a defendant satisfies the first portion of this test, the trial court next addresses whether it is reasonably probable the plaintiff will prevail on the merits at trial. (§ 425.16, subd. (b)(1).) However, a court need not reach this second prong of the analysis if the "arising from protected conduct" requirement is not met. (*Equilon, supra,* 29 Cal.4th 53, 67; *Navellier, supra,* 29 Cal.4th 82, 88-89.)

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10 Although Appellants generally argue that their development plans are of public interest, they do not seriously assert the protection of the portion of the anti-SLAPP statutes governing assertions about topics of public interest. (§ 425.16, subds. (e)(3), (4).) This is an appropriate approach for Appellants to take. (*Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 802-804 (*Wang*).)

During review of an anti-SLAPP order, we do not address the relative merits of the parties' claims and defenses, but instead determine only whether the challenged order correctly analyzed the record provided. (*Freeman, supra*, 154 Cal.App.4th 719, 732-733.) "[I]t is not our task to resolve factual disputes or make credibility determinations on [a] section 425.16 motion; we accept plaintiffs' evidence as true for purposes of our analysis." (*Freeman, supra,* at p. 733.) A cause of action may only be stricken under the anti-SLAPP statute if it arises from protected speech or petitioning activity and lacks even minimal merit. (*Mann, supra,* 120 Cal.App.4th 90, 105-106; *Navellier, supra,* 29 Cal.4th at p. 89.)

Here, the trial court overruled demurrers as to the first six causes of action of the SACC, and that ruling is not directly challenged on appeal. It is appropriate for us to take into account the papers filed in connection with the demurrers, as well as that companion ruling (issued in the same order), to the extent that they apply to common issues of law. (But see *Wang, supra,* 153 Cal.App.4th 790, 811 [demurrers address questions of law, while the motion to strike also takes into account affidavits].) We therefore assume that those six theories pass the "minimal merit" test, although the pleading is somewhat problematic in some respects.[11] (See *Navellier, supra*, 29 Cal.4th at p. 89; note that we will not further consider the UCL issues; see fn. 8, *ante*.) Any further issues of pleading

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11 Review of these issues has been made somewhat difficult because the SACC is set up in a confusing fashion, in which the introductory paragraphs (nos. 11-22) set forth a "statement of the case" that is incorporated into all subsequent causes of action, even though not every incorporated paragraph relates to every cause of action.

and proof of the SACC, outside of the anti-SLAPP context, can properly be left to the trial court upon remand.

B. Preliminary Procedural Questions

At the outset, we reject the argument by Respondents that it is somehow inappropriate for the individual cross-defendants to appeal this order denying the motion to strike, to which they were moving parties. Respondents claim those individuals have no standing to appeal, since the underlying complaint upon which this SACC is built was brought only by the artificial entity, Center, not by its principals, such as the Finfers. However, the SACC contains extensive agency allegations and claims that the individuals were acting for themselves and for Center. It is entirely appropriate for these named individual cross-defendants both to bring a motion to strike a pleading that names them, and to appeal it. (See *Foundation of Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1392 [an otherwise outside/third party, who intervened, cannot bring an anti-SLAPP motion].)

Next, Appellants reiterate that the evidentiary objections that they filed in the trial court are reasserted on appeal. Those mainly challenged various statements found in the numerous homeowners' declarations, about their beliefs about the motives of cross-defendants in pursuing their development plans (as conclusory, speculative or opinion). The trial court issued a detailed written ruling on those evidentiary objections, which we would find necessary to reverse only for abuse of discretion. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) The court excluded certain exhibits that lacked foundation, such as maps or title reports. In our de novo review of the admissible

portions of this record, we have not found it necessary to consider those objected-to materials and need not issue a separate evidentiary ruling.

Case authority draws a distinction between allegations of a defendant's protected communicative acts that will be utilized for evidence supporting a plaintiff's claim, as opposed to allegations of protected conduct that amount to the wrongful acts sued upon. (*Wang, supra*, 153 Cal.App.4th at pp. 808-809; *Peregrine Funding, Inc. v. Sheppard Mullin Richter Hampton LLP* (2005) 133 Cal.App.4th 658, 673 (*Peregrine Funding*).) The statute allows both parties' sets of papers to be considered in ruling on the motion, and the record is replete with pertinent lodged documents relied on by both sides. (§ 425.16, subd. (b)(2); *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286 (*Salma*) [court examines declarations in first prong analysis under § 425.16].)[12] The terms of the pleadings are properly subject to interpretation both at the trial court and the appellate levels, for any judicial admissions of fact that they may contain. (See *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271-1272 [judicial admissions of facts in the pleadings are conclusive on the pleader].) This is not a fact intensive matter, however, but depends on the legal effect of the pleaded facts.

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12 The main holding in *Salma, supra,* 161 Cal.App.4th 1275, 1280 dealt with "whether a plaintiff or cross-complainant may avoid a pleadings challenge pursuant to Code of Civil Procedure section 425.16 by amending the challenged complaint or cross-complaint before the motion to strike is heard. We conclude he may not, and therefore we . . . order dismissal of both the conversion and intentional interference claims." Both declarations and verified pleadings may be considered in ruling on the motion. The SACC in our case is not verified. (*Id*. at p. 1290.)

Thus, Respondents have no basis flatly to argue Appellants' showing is per se inadequate, merely because they did not submit any of their own declarations with their initial moving papers, and then relied on Respondents' opposition. The entire record before the trial court is properly to be considered.

## II

## *APPLICATION OF RULES: FIRST PRONG*

### A. Introduction

According to Appellants, these claims plead both protected and unprotected conduct, while the homeowners oppose any such "mixed" analysis. Even where a "cause of action may be 'triggered by' or associated with a protected act, . . . it does not necessarily mean the cause of action *arises* from that act." (*Freeman, supra,* 54 Cal.App.4th at p. 730.) The principal thrust or gravamen of the plaintiff's cause of action is considered in initially determining whether the anti-SLAPP statute applies. (*Martinez, supra,* 113 Cal.App.4th 181, 188.)

This case features numerous causes of action containing allegations of protected petitioning conduct, that are mixed with claims about other conduct amounting to private parties' breaches of contract or tort duties. Some of the allegedly injurious acts were written or oral statements or writings "made before a . . . judicial proceeding" (§ 425.16, subd. (e)(1)), which might amount to protected petitioning conduct. Some of the allegedly injurious acts were statements made in connection with Appellants' development plans for Lot 4, to building department authorities or public officials, or

public statements made in town hall meetings (§ 425.16, subd. (e)(2) [statements in connection with issues under consideration or review in official proceedings]).

Accordingly, we must examine which acts in those processes gave rise to the asserted claims, for purposes of applying the anti-SLAPP statute. (*Navellier, supra,* 29 Cal.4th at p. 92.) The issue is whether the arguably protected conduct (communications with public officials) substantially gave rise to the injuries that Respondents have alleged, or if any protected conduct was only "incidental" or "collateral" to the actually injurious acts (in the private contractual arrangements alleged in the SACC). (*Martinez, supra,* 113 Cal.App.4th at p. 188.) We can then turn our attention to the trial court's ruling on the second prong of the anti-SLAPP analysis.

B. Mixed Causes of Action: First, Contract; Fourth, Deceit; Fifth, Waste

The court in *Navellier, supra,* 29 Cal.4th 82, "stated nothing in the anti-SLAPP statute categorically excludes any particular type of action from its operation. [Citation.] Conduct alleged to constitute a breach of contract may also come within constitutionally protected speech or petitioning. [Citation.] The focus of the statute is not the form of plaintiff's cause of action, but the defendant's activity that gives rise to the asserted liability. [Citation]." (*Midland Pacific Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, 272 (*Midland*).)

These causes of action essentially allege the RMD as the foundation for the claims, in the introductory allegations and also the causes of action themselves. Respondents claim Appellants breached their contractual duties regarding the maintenance of the parking lot, and did not accurately represent their obligations or abide

by the easements granted in favor of the homeowners. These underlying facts are based on the manner of Appellants' efforts to seek contractual approvals from the homeowners for proposed changes in the parking areas of the development, as would be required by the RMD.

Respondents allege that full disclosures of the proposed scope of the proposed redevelopment were not made, and Appellants misstated the provisions of the RMD, in connection with the threats to tow vehicles and charge for overnight parking. Further, Appellants allegedly misrepresented to the homeowners the RMD utility provisions and the insurance requirements for the parking area.

In the deceit cause of action, Respondents allege that conduct outside the normal scope of negotiating and implementing the revised RMD occurred, so that injuries arose from that private conduct, as opposed to the processing of any development applications to building authorities. That is, "Plaintiffs instead are alleging defendants failed to disclose known material information that affected the [homeowners'] economic interests, at a time when there was a duty to disclose such information." (*Wang, supra*, 153 Cal.App.4th 790, 810.)

In the waste claim, the homeowners allege in a somewhat tenuous manner that through the RMD, Appellants undertook and breached "guardianship" duties toward them in those respects. (§ 732 [provides a remedy in damages, for any aggrieved person, against "a guardian, conservator, tenant . . . of real property," who commits waste on the property].)

In *Wang, supra*, 153 Cal.App.4th 790 this court addressed breach of contract and fraud allegations in a land development context, for purposes of the anti-SLAPP analysis. The Wang family plaintiffs sold a portion of their land to defendant Wal-Mart, but contrary to the plaintiffs' understanding of the deal, the defendant did not relocate an access road that plaintiffs needed to retain, but instead obtained a city resolution that vacated the road and replaced it with emergency access and an alley. Plaintiffs sued Wal-Mart, which filed an anti-SLAPP motion on the grounds that the allegations in the complaint arose from protected petitioning activity (seeking and obtaining development permits from the city). This court overturned a trial court determination that the complaint arose from protected activity, reasoning that anti-SLAPP protections do not apply to that scenario; the protected activity was merely incidental or collateral to the unprotected activity alleged in the complaint. (*Id.* at p. 802.) The "overall thrust" of the complaint challenged the manner in which Wal-Mart dealt with the plaintiffs, and the pursuit of governmental permits and approvals was collateral to those private dealings. (*Id*. at p. 809.)

In *Midland, supra*, 157 Cal.App.4th 264, the court commented on the facts in *Wang, supra*, 153 Cal.App.4th 790, stating: "Indeed, modern real estate development almost always requires governmental permits. The anti-SLAPP statute will not protect a developer from a complaint for breach of contract simply because the developer sought governmental permits for the activity that constitutes the breach. The purpose of the contract in *Wang* was to allow Wal-Mart to develop its property. Governmental approval was simply collateral to that purpose." (*Midland, supra,* at p. 273.)

Where a pleading has based its fraud or other causes of action upon the defendant's business-related activities, such activities, even if related to a publicly administered proceeding, do not necessarily amount to protected "petitioning activity." "That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." (*City of Cotati, supra*, 29 Cal.4th 69, 78.) It still must be determined whether a defendant's alleged acts that underlie a particular cause of action were, in and of themselves, acts carried out "in furtherance of the right of petition or free speech." (*Ibid.*; *Wang, supra*, 153 Cal.App.4th at p. 805; *Kajima Engineering, supra*, 95 Cal.App.4th at p. 929.) For example, alleged fraud and breach of contract causes of action that arose from certain activities in the course of the defendant's business (bidding and contracting practices), were not deemed to be based upon acts in furtherance of the defendant's right of petition or free speech, but rather upon tortious conduct. (*Id.* at pp. 929-932.)

Thus, where only a "purely business type event or transaction" forms the basis of the claim against the defendant, there is no anti-SLAPP protection, because " '[t]he statements or writings in question must occur in connection with "an issue under consideration or review" in the proceeding.' [Citation.]" (*Wang, supra*, 153 Cal.App.4th at p. 806, citing *Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677.) The question should be whether the plaintiff is seeking relief from the defendant for its protected communicative acts. (*Wang, supra*, at p. 806.)

In *Midland*, the court analyzed whether a breach of contract cause of action fell within the first prong of the anti-SLAPP test, as arising out of petitioning activity. There,

the claim for breach of contract was based on the defendants' submission of a certain tract map to the planning commission and city council. "These acts were in the course of an official proceeding and were clearly in furtherance of the [defendants'] right of petition and free speech." (*Midland, supra,* 157 Cal.App.4th at p. 272.) Due to the contractual relationship between the plaintiff and defendants, the alleged breach of contract arose directly from defendants' petitioning activity (statements made and plans submitted to planning authorities), since those were exactly the acts provided for in the contract (to obtain governmental approval). Therefore, the petitioning conduct was not "collateral" to the contract, and it was necessary to reach the second half of the anti-SLAPP test. (*Id.* at pp. 272-275.) In that analysis, the court said that since the defendants had agreed to use their best efforts to obtain city approval of a certain tract map, the allegations that they had pursued an entirely different and competing map constituted the gravamen of the plaintiff's breach of contract claim, and enough had been demonstrated about the probable meritorious nature of the claim. (*Ibid.*)

Here, the record shows there were both private agreements and representations among the parties, along with essential applications for governmental permits and/or judicial relief, in the course of Appellants' efforts to redevelop the property. "For purposes of interpreting section 425.16, subdivision (e)(2), our focus should be upon the moving parties' activities that were carried out in the course of satisfying the conditions of the contract [RMD] and performing it, which activities included [Appellants'] business practices as a developer in obtaining the necessary governmental permission to build . . . ." (*Wang, supra,* 153 Cal.App.4th 790, 808.) Here, the RMD contractually or

as an equitable servitude required Center to seek agreements from a majority of Respondents, to pursue its parking area changes.

Several factors lead us to conclude these contract-related causes of action are not based principally or essentially on protected petitioning conduct. The business-related activities that are pled in the SACC as giving rise to contract and tort claims are founded in the manner in which Appellants sought to pursue plans for their redevelopment project, allegedly to the detriment of the homeowners. Such allegedly improper conduct does not arise from Appellants' petitioning activities in pursuing the permits or court action, but rather from their conduct in carrying out contractual duties and negotiating changes, within the overall context of the parties' historical contractual relationship. Respondents are pleading and seeking to prove alleged misconduct that occurred behind the scenes, that was not primarily directed toward and did not exclusively constitute any communicative acts to a court or to a public agency, during the negotiation and redevelopment process. (See *Wang, supra*, 153 Cal.App.4th 790, 808.)

The alleged acts took place during a long time period, about 2003 through 2006, including the communications with the homeowners. This course of conduct was not shown to be principally concerned with "an issue under official review that required a determination to be based upon the exercise of anyone's free speech or petition rights." (*Wang, supra*, 153 Cal.App.4th 790, 808.) The SACC and declarations do not demonstrate that either pending litigation or permit applications were at the forefront of the parties' dealings during the relevant time periods. Instead, as was the case in *Wang*, the parties and their representatives "engaged in business dealings or transactions, in

which their contractual dealings and extracontractual activities (allegedly fraudulent) form the gravamen of the principal allegations." (*Ibid.*)

When we examine the allegations of the SACC as a whole, we do not find that the petitioning activity is the principal or most substantial aspect of the claims, but instead it is incidental or collateral to the substantive breaches of duty that are claimed, based in major part on the RMD or misrepresentations made about it. The land use planning communications to public officials were made only in conjunction with the principal business transaction. The overall thrust of the complaint challenges the manner in which the parties privately dealt with one another, on both contractual and tort theories, and does not principally challenge the collateral activities of pursuing governmental approvals or judicial relief. (See *City of Cotati, supra,* 29 Cal.4th 69, 78.) Even without evaluating the validity of the claims, we conclude the bulk of the challenged conduct does not fall within the protected definitions, under the first prong of the test. (*Peregrine Funding, supra,* 133 Cal.App.4th 658, 670-673.)

C. Mixed Causes of Action: Second, Invasion of Privacy; Sixth, RICO

These causes of action essentially allege that Appellants' investigative and preparatory activities in connection with (1) pursuing their redevelopment plans or (2) filing their original declaratory relief complaint exceeded appropriate bounds, with respect to monitoring and recording license plate information and vehicle ownership of homeowners and their tenants or guests. The homeowners allege that these activities amounted to coercion or extortion designed to obtain their consent to giving up their parking rights as specified in the RMD. (18 U.S.C. § 1962(c) [racketeering allegations].)

In their declarations, they claim those were viewed as serious invasions of privacy for themselves and their guests and tenants. (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 37.)

At the stage of determining whether the anti-SLAPP statute potentially applies to conduct that may be protected, courts need not inquire into the "validity" of the speech. (*Mann, supra,* 120 Cal.App.4th at p. 105; *Navellier, supra,* 29 Cal.4th at p. 94.) Instead, we focus upon the "activity that gives rise to [Appellants'] asserted liability." (*Id.* at p. 92.)

In its ruling, the trial court made a finding that Appellants' obtaining of confidential DMV information about residents, guests, and tenants was done without the required attorney affidavit. Under Vehicle Code section 1808.21, subdivision (a), "[a]ny residence address in any record of the department is confidential and shall not be disclosed to any person, except a court, law enforcement agency, or other government agency, or as authorized in Section 1808.22 or 1808.23." There are exceptions, such as where an attorney supplies an affidavit "that the motor vehicle or vessel registered owner or driver residential address information is necessary in order to represent his or her client *in a criminal or civil action which directly involves the use of the motor vehicle* . . . that is pending, is to be filed, or is being investigated." (Veh. Code, § 1808.22, subd. (c); italics added.)

This legislation provides safeguards for the information requested pursuant to statute, including in Vehicle Code section 1808.22, subdivision (c)(1): "(1) The attorney shall state that the criminal or civil action that is pending, is to be filed, or is being

investigated *relates directly to the use of that motor vehicle* or vessel. [¶] (2) The case number, if any, or the names of expected parties to the extent they are known to the attorney requesting the information, shall be listed on the request. [¶] (3) A residence address obtained from the department shall not be used for any purpose other than in furtherance of the case cited or action to be filed or which is being investigated. [¶] . . . [¶] (6) Within 10 days of receipt of a request, the department shall notify every individual whose residence address has been requested pursuant to this subdivision." (Italics added.) Misdemeanor penalties apply for knowing violations of certain subdivisions (none was pursued here).

In *State Farm Mutual Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, the court held that these Vehicle Code section 1808.22 exceptions to the privacy provisions of the Vehicle Code are broad enough to allow an attorney to obtain such information when investigating a potential claim for conversion of a vehicle. That is, the exception is not limited to actions stemming from automobile accidents involving unknown drivers. (*Ibid.*)

On this record, the inquiry is whether the allegations referring to arguably protected activity (i.e. preparation for litigation) are only incidental or collateral to a claim that is based essentially on unprotected activity. (See *Wang, supra*, 153 Cal.App.4th 790, 802.) In its ruling, the trial court found that Center's prior attorney had failed to provide the appropriate affidavit, to obtain information about registered owners of motor vehicles in the context of an action that "directly involves the use of the motor vehicle." (Veh. Code, § 1808.22, subd. (c).) This conduct lacked the necessary indicia of

legitimacy. It is questionable, as a matter of statutory interpretation, whether this declaratory relief action about contractual rights (parking easements) actually directly addresses "the use of the motor vehicle," when it was parked according to certain property rights allegedly in need of clarification. The investigations went well beyond compiling publicly available information, such as recording of vehicle license plates on site. There is nothing inherent in the civil suit's declaratory relief request for interpretation of the RMD that necessarily invoked or justified such preliminary Vehicle Code investigations, before the disputed land use rights had been settled.

In light of these criteria, we cannot say that the allegations about Appellants' conducting of these investigations are confined to privileged conduct relating to appropriate preparation for litigation. The main or essential target of these causes of action is not any communicative conduct related to filing or investigating the original litigation. Rather, such communicative conduct is incidental or collateral to their main allegations of activities that are unrelated to normal property management or business dealings, and that go into the realm of tortious or statutorily forbidden conduct. As such, the trial court appropriately determined that these claims did not arise out of protected petitioning conduct.

D. Mixed Cause of Action: Third, Abuse of Process

This cause of action focuses on allegedly wrongful acts carried out in the conduct of the underlying declaratory relief litigation, including the filing of allegedly false proofs of service, representations that Doe defendants had been named and served, and entries of defaults that had to be set aside because service had been made personally upon parties

who were already represented by counsel. The homeowners have a theory that these activities may have been conducted by Attorney Fitzsimmons in order to manipulate RMD voting requirements for changes in their valuable property rights under the RMD.

"The common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056-1057 (*Rusheen*).) It has been " 'interpreted broadly to encompass the entire range of "procedures" incident to litigation.' " (*Id.* at p. 1057.) "To succeed in an action for abuse of process, a litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings. [Citation.]" (*Ibid.*)

In *Rusheen*, *supra*, 37 Cal.4th 1048, the Supreme Court upheld an order striking a cross-complaint for abuse of process, under the anti-SLAPP statutory scheme. The court decided that litigation privilege protected not only the judicial pleadings and process in a case, which are communicative acts, but also related noncommunicative acts that are "necessarily related to the communicative conduct" (i.e., enforcement of judgment in reliance on the filing of privileged declarations of service). (*Id.* at p. 1062.) "On close analysis, the gravamen of the action was not the levying act, but the procurement of the judgment based on the use of allegedly perjured declarations of service." (*Ibid.*)

Where, however, not only communicative acts are sued upon, and "it is demonstrated that an independent, noncommunicative, wrongful act was the gravamen of

the action," no litigation privilege nor any anti-SLAPP protection will apply. (*Rusheen, supra*, 37 Cal.4th 1048, 1065.)

To evaluate those privilege questions, the Supreme Court applied this definition of litigation privilege, applicable to communications " '(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]' [Citation.]" (*Rusheen, supra*, 37 Cal.4th 1048, 1057.) Where litigation privilege applies to declarations of service, it necessarily protects against torts arising from such privileged declarations. (*Id*. at p. 1062.)[13]

In our case, the principal thrust of the SACC abuse of process claim seeks recovery for alleged frivolous and inappropriate use of meritless judicial process. Respondents seek recovery of attorney fees and other expenses incurred to have the erroneously entered defaults set aside, as well as recovery of emotional distress and other damages. Our question is whether Respondents are seeking relief from Center chiefly for its communicative acts in the litigation context. (*Wang, supra*, 153 Cal.App.4th 790, 806.)

Not only communicative acts, but "independent, noncommunicative, wrongful act[s]" form the gravamen of this cause of action. (*Rusheen, supra*, 37 Cal.4th 1048, 1065.) This pleading bases its theory of recovery on allegedly improper activities that

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13 Respondents cannot correctly rely on a previous demurrer ruling as definitively establishing that litigation privilege has no application to these claims; that issue was resolved only for pleadings purposes as to a prior pleading. We need not reach questions of litigation privilege to resolve these anti-SLAPP issues.

would go beyond any protected "petitioning activity" conducted in the court proceedings, in connection with issues under consideration or review. (§425.16, subd. (e)(2).) Nevertheless, a substantial portion of the allegations in the abuse of process cause of action depend upon acts carried out "in furtherance of the right of petition or free speech." (*City of Cotati, supra,* 29 Cal.4th 69, 78; *Wang, supra,* 153 Cal.App.4th at p. 805; *Kajima Engineering, supra,* 95 Cal.App.4th 921, 929.)

Respondents have set forth, as elements of this cause of action, that Center "contemplated an ulterior motive in using the process," as specified, and acted willfully by using court process in a manner that was not within the regular conduct of such proceedings. (*Rusheen, supra,* 37 Cal.4th 1048, 1057.) Since this claim is essentially grounded in litigation-related conduct, the better approach is to proceed to the second prong of the anti-SLAPP analysis. (*Midland, supra,* 157 Cal.App.4th 264, 272-275.) We then address the remaining topics argued on appeal.

III

*STATUTORY SCHEME: SECOND PRONG; SANCTIONS*

A. Rules and Application

"Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Mann, supra,* 120 Cal.App.4th at p. 106.) When a complaint essentially alleges varieties of protected petitioning conduct, the burden is shifted to plaintiffs to show they have established a probability of prevailing in the action. (§ 425.16, subd. (b)(1); *Navellier, supra,* 29

Cal.4th at pp. 87-89.) The trial court addresses whether it is reasonably probable plaintiffs will prevail on the merits at trial, considering the evidence presented, in declaration form, that actionable conduct took place. (*Wang, supra*, 153 Cal.App.4th 790, 808; § 425.16, subd. (b)(1).)

As discussed above, the trial court correctly applied the first prong of the applicable analysis as to the bulk of the causes of action, although abuse of process is an exception. In any case, the trial court further addressed all the issues regarding the second prong of the test. Because of our conclusions set forth above, we find it necessary only to discuss in detail the trial court's ruling about the probability of prevailing as to the abuse of process claim, since that claim may be read as directly arising from litigation-related acts. (*Midland, supra*, 157 Cal.App.4th 264, 272-275.)

In their showing in opposition to the motion, Respondents provided an attorney declaration authenticating copies of the erroneously taken default papers and the mistaken Doe service documents, as well as the relevant orders by the trial court correcting those problems. Also, in the demurrer proceedings, Respondents requested judicial notice of filed documents in the previous action, and the court agreed. (Evid. Code, § 452.) Even though those documents might ordinarily be entitled to some presumption of privilege, Respondents also provided extensive evidence that places them in a context that allows inferences to be drawn that those filings may have been made for improper purposes. (*Rusheen, supra*, 37 Cal.4th 1048, 1062.) It cannot be determined at this time if these problems were caused by something more than sloppy lawyering.

In conclusion, the trial court correctly allowed the matter to proceed beyond the anti-SLAPP stage as to this claim, as well as the others that survived demurrer.[14]

B. Sanctions

Respondents have requested an award of monetary sanctions for this appeal, contending it is frivolous and was taken for procedural advantage. (§ 907.) We note that the trial court's ruling denied a previous request by Respondents for an award of attorney fees or sanctions under the anti-SLAPP statute, "at this time." (§ 425.16, subd. (c) [allows a prevailing plaintiff on a special motion to strike to recover costs and reasonable attorney's fees, pursuant to the standards of section 128.5, "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay . . . ."].) The trial court did not make any such finding and it is not directly challenged in this appeal.

We cannot find that Respondents have made any adequate showing that sanctions would be warranted for any of the reasons argued. We have already indicated that a portion of the Respondents' appendix provided on appeal must be stricken, pursuant to Appellants' motion. Moreover, Respondents did not present their request for sanctions properly under California Rules of Court, rule 8.276. Respondents shall recover only the ordinary costs on appeal.

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14 Since we affirm the order denying their special motion to strike, the request by Appellants for an award of attorney fees is moot. (§ 425.16, subd. (c).)

## DISPOSITION

The order denying the special motion to strike is affirmed. Appellants' motion to strike is denied in part regarding the Respondents' briefing and granted in part regarding the Respondents' appendix, pages 49 through 127. No attorney fees or sanctions are awarded. Appellants to pay all ordinary costs of appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.